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In the Supreme Court of the United States

OCTOBER TERM, 1979

LESLIE SCHMIDT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that the district court improperly considered his failure to cooperate with the government in determining his sentence.[1]

1. In September 1978, petitioner entered a conditional guilty plea to a three-count indictment charging that he had possessed and manufactured methamphetamine, in violation of 21 U.S.C. 841, and had conspired to commit

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[1]The judgment of the court of appeals in this case was entered on February 14, 1980 (Pet. App. 2a). The petition for a writ of certiorari was filed on March 17, 1980, and is therefore two days out of time under Rule 22(2) of the Rules of this Court.

those offenses, in violation of 21 U.S.C. 846. He was sentenced to concurrent ten-year terms of imprisonment to be followed by a three-year special parole term.[2]

The court of appeals reversed because the district court had failed to hold a hearing on petitioner's motion to supppress certain evidence. 604 F. 2d 236 (1979). On remand, petitioner pleaded guilty to one count in the indictment in exchange for a dismissal of the remaining counts (Tr. 3, 14, 23-24). The district court sentenced petitioner to five years' imprisonment to be followed by a two-year term of special parole (Tr. 28-29). The court of appeals affirmed (Pet. App. 1a-2a).

2. Petitioner claims (Pet. 3-8) that the district court improperly considered his failure to cooperate with the government prior to imposition of his second sentence. He also claims that this amounted to an impermissible penalty for exercising his Fifth Amendment rights (*ibid.*).

However, this Court's recent decision in *Roberts* v. *United States*, No. 78-1793 (Apr. 15, 1980), establishes that it is proper for the district court to take into consideration the uncooperative conduct of a defendant before imposing sentence. In addition, the record in this case fails to support petitioner's claim that his sentence was enhanced based either on his refusal to name his accomplices or on his exercise of Fifth Amendment rights.

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[2]The maximum term of imprisonment to which petitioner was subject on any one count was actually only five years because his offenses did not involve narcotics. See 21 U.S.C. 802(16), 841(b)(1)(B). This error was corrected by the district court when petitioner was resentenced (Tr. 16-17). ("Tr." refers to the transcript of petitioner's second sentencing hearing, held on September 14, 1979.)

During petitioner's first sentencing hearing, the district court did consider the extent of petitioner's cooperation (see Pet. 4-7). But the court was careful to explain that it was not enhancing petitioner's sentence based on that factor: "I'm not penalizing him more harshly or less harshly. I am considering all of the factors that you consider in imposing a sentence * * *" (*id.* at 5). On appeal, petitioner contended that even this limited consideration of the extent of his cooperation violated the then prevailing rule in the Third Circuit. See *United States* v. *Garcia*, 544 F. 2d 681 (3d Cir. 1976). The court of appeals noted petitioner's contentions based on *Garcia* (see 604 F. 2d at 237 n.3) but reversed his conviction and sentence on other grounds.

After the court of appeals reversed and remanded the case, the district court conducted a second sentencing hearing. At that time, the district court made no reference to petitioner's lack of cooperation and did not suggest that petitioner was being punished for exercising any constitutional right. To the contrary, the district court indicated that it was taking into account petitioner's untruthfulness in answering the court's questions during the guilty plea and sentencing hearing. During the hearing, the district court inquired into the factual basis for the guilty plea (Tr. 18). The court asked petitioner how he produced methamphetamine, where he obtained the necessary equipment and materials, and where he learned how to manufacture the substance. Petitioner stated that he had learned how to manufacture methamphetamine through study in various public libraries, although he could not recall the names of the books that he purportedly read (Tr. 19). The district court

found petitioner's explanation to be "completely incredible," adding that "[n]o reasonable man could believe it" (Tr. 21-22).

Petitioner's attorney argued in favor of leniency before the district court, asserting that petitioner had been a model prisoner after his original conviction and that he had been involved in criminal activity only once. The district court stated in response (Tr. 27):

> You said got involved. I'm just asking him how he got involved and he doesn't want to tell me * * * You know it's incredible that any reasonable man would accept this explanation of his. It's rather insulting of him to give it to the Court.

At no time did the district court indicate that it was punishing petitioner for exercising any constitutional right.[3] The court's sole references were to the severity of petitioner's offense and the fact that he had lied under oath during the guilty plea and sentencing hearing.[4]

The district court's consideration of petitioner's willingness to lie to the court under oath was wholly proper. See *United States* v. *Grayson*, 438 U.S. 41 (1978). Moreover, even if the district court had considered petitioner's refusal to cooperate as a negative sentencing factor, that too is a permissible consideration as recently

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[3]Petitioner freely identified two other participants in the scheme—his brother, Alan Schmidt, and Anthony Emrisko. He testified that no one else was involved (Tr. 22).

[4]The court accepted the representation of defense counsel that petitioner had a favorable record in prison following his first conviction: "It's been represented to me that he has an exemplary record and I will take that as established * * *" (Tr. 25).

confirmed by this Court in *Roberts* v. *United States*, *supra*. Since petitioner's sentence was imposed within statutory limits, the court below properly declined to disturb it on appeal. *Dorszynski* v. *United States*, 418 U.S. 424, 440-441 (1974).[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[5]Because the record of petitioner's second sentencing hearing contains no indication that the district court enhanced his sentence based on an exercise of Fifth Amendment rights, petitioner's reliance on the Fifth Amendment to attack his sentence is wholly misplaced.